WORK DISABILITY IN THE NEW ERA

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The Kansas statute governing work disability is K.S.A. 44-510e. It may be applicable in those instances when a worker has sustained permanent partial general disability (body as a whole impairment) not covered by the schedule in K.S.A. 44-510d.

K.S.A. 44-510e(a)(2)(B) gives rise to a presumption that a worker is to be compensated for functional impairment by stating:

> The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a)(2)(C) allows for the rebuttal of this presumption and provides for compensation to be paid in excess of the functional impairment, as follows:

> An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ('work disability') if:
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> The percentage of functional impairment determined to be caused solely by the injury exceeds 7½ % to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

Both criteria of the statute must be met in order to make a claim for work disability. The general body impairment caused solely by the injury must exceed

7½% or 10% if there is preexisting impairment *and* the post-injury wage loss directly attributable to the work injury is at least 10%. If these thresholds are met, K.S.A. 44-510e(a)(2)(C) provides that:

> In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

As in the past, the post-injury task loss and the post-injury wage loss are averaged to determine the percentage of work disability. It should be noted, however, that both the post-injury task loss and the post-injury wage loss must be caused solely by the injury and not other factors.

K.S.A. 44-510e(a)(2)(D) defines "task loss," as follows:

> 'Task loss' shall mean the percentage to which the employee, in the opinion of licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employed would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

The period for which a worker's tasks must be identified has been reduced from 15 years to 5 years. As in the past, a licensed physician must provide the task loss opinion by comparing the assigned restrictions with the identified tasks; however, tasks lost as a result of preexisting permanent restrictions are not to be included in the computation of the percentage task loss.

K.S.A. 44-510e(a)(2)(E) defines "wage loss," as follows:

> 'Wage loss' shall mean the difference between the average weekly wage the employee was earning at

> the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

The statute requires a comparison between the pre-injury average weekly wage and the post injury average weekly wage that the injured worker is *capable* or earning in determining the percentage wage loss. The previous comparison based on *actual* post-injury earnings has been abolished. The administrative law judge is now required to impute a wage based on, but not limited to, the stated factors. Actual post-injury wages being earned creates a rebuttable presumption of the injured worker's post-injury average weekly wage but can be overcome by "competent evidence."

K.S.A. 44-510e(a)(2)(E) further states:

> (i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.
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> (ii) The actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge pursuant to K.S.A. 44-510e(a)(2)(E), and amendments thereto.
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> (iii) The injured worker's refusal to accommodated employment within the worker's restrictions as established by the authorized treating physician and

at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

The statute makes it clear that the wage loss must be directly attributable to the injury.

Likewise, the injured worker must have the post-injury capacity to enter into a valid contract of employment. The actual or *projected* value of fringe benefits is now included in computing the post-injury average weekly wage. If the injured worker refuses an offer of accommodated employment within restrictions assigned by the authorized treating physician at a wage of at least 90% of the pre-injury average weekly wage, there is a rebuttable presumption of no wage loss.

BREAKING IT DOWN
GUESSING AT ANALYSES

As with any statute, the key to the analysis is to look at the words individually. There are no decisions that we are aware of discussing "work disability" to date. It remains unknown when a decision will be issued on an appellate level, but it is at least a few years away.

When the law does finally get interpreted by an appellate court, the following are some quick rules of statutory construction:

A) First, words utilized should be given their commonplace and commonsense meanings.

B) Statutes must be construed in harmony with each other.

C) If there is ambiguity, legislative intent should be searched for.

D) Where Kansas courts have interpreted similar words, phrases, or concepts in the past, it is assumed that the legislature was aware of these interpretations, and courts will try to continue to apply them.

E) On occasion, decisions from other jurisdictions can be useful, but are not controlling.

F) If something was added, deleted, or changed from the old law, the legislature must have meant something by the modification.

Bearing these concepts in mind, an attempt will be made to breakdown the "work disability statute" and review some of the words and possible interpretations.

A) MEETING THE THRESHOLD

As noted above, there are new "thresholds" for being entitled to a work disability. Work disability is still only applicable if the schedule of injuries does not apply. Work disability remains a purely mathematical "formula" and does not consider damages such as pain and suffering, emotional distress, loss of enjoyment of life, etc.

1) Minimum Impairment Rating.

Use of the AMA Guidelines will be more important. Courts are going to have to make a determination as to whether an injured worker has a 7.5% functional impairment or an 8% functional impairment. It has been repeatedly stated and recognized by even the authors of the Guides that they were never intended to be utilized in this fashion. Nevertheless, that is what Kansas has chosen to do.

Furthermore, under current law, it was often irrelevant to argue such minutia because the work disability usually exceeded the functional impairment. Few cases were actually litigated when the functional impairments were only a "few points apart." Those cases which were previously able to be negotiated and settled may now cause litigation.

Finally, a 2% shoulder impairment or minor carpal tunnel symptomatology may have been previously ignored. However, now it might push a claimant over the threshold such that a work disability can be claimed.

2) Ten Percent Wage Loss

Previous versions of the work disability statute utilized a 10% wage loss as a threshold. This is unchanged. However, the method of computing the claimant's average weekly wage at the time of injury can only be reduced under the new statute. Thus, it will be more difficult for injured workers to show a 10% loss.

B) CHANGES TO TASK LOSS

Previous versions of the work disability statute did not define "task loss." Naturally, in the 18 years since its enactment in 1993, the courts have developed a general definition. The new statute also does not define "task loss", but it will add some new wrinkles.

1) The shortening of looking at tasks for five years versus fifteen years will be a two-edged sword. On the one hand, it is true that many workers did heavy labor ten or twelve years before their on-the-job injury that they could not have done at the time of injury. On the other hand, the smaller the "pool" of tasks, the greater the percentage of loss when tasks are eliminated; *i.e.* losing two tasks out of five as opposed to two out of ten.

2) Preexisting Permanent Restrictions

Under the new statute, tasks which cannot be performed because of preexisting permanent restrictions are not counted. Under the old law, if you did a task within the past 15 years, and the injury excluded the task, it simply did not matter if the task was previously excluded without regard to the injury. It was still considered a "lost" task. (For example, a truck driver who had lost his CDL license due to driving infractions.)

It is first of all clear that unless restrictions are actually placed upon a person, they are not relevant. Outside the world of litigation, permanent restrictions are not generally placed on individuals. Consider the individual who develops a health condition such as chronic obstructive pulmonary disease. That person might not get an actual restriction against stair climbing; but would not physically be able to engage in that activity. Under the statute, that inability would still be irrelevant because there were no "preexisting permanent restrictions." The suffering of a bilateral knee injury which prevents stair climbing would count as a lost task.

In addition, many physicians utilized in litigation simply release individuals without restrictions, no matter the severity of the problems the person is having. It is suggested that these statements of "no restrictions" will be binding in subsequent litigation. The argument that the individual should not or could not have been engaged in a certain activity preinjury will be rejected.

It is unclear what will happen if an individual goes back and works in excess of so-called permanent restrictions, or has the permanent restrictions increased at some point following their imposition. Similarly, what if an employee passes a preemployment physical, or takes a preemployment FCE demonstrating the ability to work beyond the antiquated preexisting restrictions? Another difficult area will be when an employee has multiple sets of restrictions from different doctors. Which one is controlling?

It is unclear how these claims will be handled. Certainly, if the claimant has demonstrated long term ability to work beyond the restrictions, it seems improbable that a court will accept outdated restrictions when considering task loss.

As a practical matter, attorneys need to carefully consider how settlement documents are drafted or utilized in any workers compensation settlement hearing. It is suggested that all of the medical reports be made a part of a settlement transcript or none of them. That would seem to limit the precedential value, or at least display the conflict between the physicians.

C) WAGE LOSS FORMULA

In 1987, 44-510e read:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to *perform work in the open labor market* ***and*** *to earn* comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than the percentage of functional impairment.
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> **[COMMENT:** The 1987 statute is what led to the original "two prong test" that the legislature ultimately adopted for use in the 1993 version of K.S.A. 44-510e.]

Laying the current version alongside the previous version gives us:

1987 VERSION	2011 VERSION
ability to perform work in the open labor market and...the ability of the employee to earn comparable wage considering education, training, experience, and capacity for rehabilitation	...the average weekly wage the employee is capable of earning...based upon a consideration of all factors, including but not limited to, the injured worker's age, physical capabilities, education and training, prior experience and the availability of jobs in the open labor market (then averaged with task loss).

There are those who indicate that we are returning to the old law, and a "capacity test." It is suggested that there are material and substantial differences. It is further suggested that we have gone from an "employability" test to a "placeability" test.

In the world of vocational rehabilitation, employable means the theoretical ability to work. A person with a severe disability and limited skills can be theoretically "employable." Placeable means actually being put in a competitive employment situation, and being able to retain it. As they say: "Where the rubber meets the road."

The statute requires a consideration of availability of jobs in the open labor market. This may be the most critical change in the entire section. Recall that the old standard was the ability to perform a certain job in the open labor market. There are thousands of jobs in a geographical area that a person could perform, but could not actually obtain.

For example, hundreds of previous claimants were tagged as being "capable" of being Wal-Mart greeters. If Hutchinson, KS has one Wal-Mart, and the three greeter positions are filled, is said job "available" to the injured claimant? Or, consider service writers for car dealerships. While the former auto mechanic may have the qualifications for that position, it is generally filled internally by the senior member of the shop. The reward for years of service (no dirty hands, no heavy lifting).

In reviewing the statutory construction rules (*supra*), the key words are:

1. Available:

    a) Definition: Suitable, readily obtainable, ready for use

    b) Synonyms: Accessible, achievable, attainable, feasible, reachable, realizable, gettable

2. Open Labor Market:

    a) The "open labor market" means that group of jobs (1) in which employment opportunities routinely occur; (2) that are offered by several employers in an economic area; and (3) that are the types of jobs for which a worker seeking employment with the claimant's education, training, experience, and physical limitations would logically offer his or her services.

    b) "Open labor market" means only that type of work or services a worker is offering which are generally performed in the geographic area in which the worker is offering them. The open labor market must be reasonably accessible, and workers are not required to move their residences or travel unreasonable

distances to obtain such employment. (See *Scharfe v. Kansas State University*, 1992, head notes 2 and 3)

Now we are looking at the availability of jobs particular to this worker based on multiple factors in the open labor market. The Wal-Mart job and the auto mechanic service writer job are not actually "available" or "gettable"; even though they might be "performable" by this worker. And, the consideration takes the worker as found at the moment of injury in his/her entirety–and not solely based on restrictions from the job injury. Those factors include (but by statute "are not limited to") the following:

A. Age:

Formerly not used by vocational experts as a consideration. It was taboo because of the ADA; despite the fact it is a very heavy factor in SSDI (both federal programs). Obviously, age is a major consideration in the hiring process. Age may be a *negative factor* in some employments due to the physical requirements, learning curve, health issues, etc. Age may be a *positive factor* in other employments because the employee has a positive work history, older employees are less likely to suffer industrial accidents, no build up of service will accrue relative to vacation, retirement benefits, etc.

It seems imperative that when speaking of available work in the open labor market, age will be a critical factor.

B. Education:

Does formal education continue to be a major factor in the hiring process? Today's marketplace has individuals with Master degrees working as sales clerks. The Internet with readily accessible information changes the dynamics. A third grader with Internet skills can be more valuable than a 55 year old college graduate without those same skills. Without an iPad, how many people really know the capital of Arkansas? How about pi square? Who was the home run leader for the National League in 1972? Is having retained such knowledge still of value?

In short, other than professionals, does formal education make one more marketable? Is it a detriment to hiring due to being overqualified in a depressed job market?

C. Physical Capabilities:

This portion of the statute considers all physical restrictions. The portion dealing with task loss deals with those restrictions caused by the

accident. The vocational expert will have to know more than the restrictions imposed by treating/evaluating physicians.

Consider the truck driver who injures his back, and can no longer handle road vibration. As with many other similarly situated truckers, he is obese (years of fast food and sedentary work), has coronary issues, smokes (what else are you going to do in a truck all day), has bad knees, diabetes, and bad hearing. The individual's wage loss is still caused by the on-the-job injury.

It would appear that vocational assessments can no longer be appropriately accomplished by a phone interview and a records review. How can one consider "all factors" as required by statute without an interview?

D. All Factors:

This portion of the statute must come from the Kansas motto: "it's as big as you think." Consideration of the individual might include a criminal record, an aversion to math in any form, tattoos and piercings, scars, a lisp or stutter, etc. How about a history of community activities, political connections, hobbies, athletic skills, personality traits, etc.?

How does the previous benevolent employer fit in, or the individual who only had the job because of family connections? Again, an in-person vocational evaluation will be necessary.

CLAIMANT'S POTPOURRI

A. As a claimant's attorney, I will continue to instruct my clients to perform a **quality job search**. It would appear difficult to overcome the search and impute a high wage, or maybe any wage, if the claimant simply cannot find a job. There would appear to be a shifting of the burden of proof. An unsuccessful quality job search *proves* there is no work **available** considering age, education, previous training, etc.

B. In addition to the good faith effort of applying for jobs, a quality job search will now include applying for "multiple categories" of employment. That is, a claimant should probably not apply only in areas of employment where they were previously successful. Claimant should apply for sales positions, fast food positions, factory work, clerical work, etc. A claimant who is unsuccessful in applying for sales work, eliminates large categories of employment if a transferable skills analysis is done.

C. It would seem that standardized vocational testing may be required. Again, in considering "all factors", tests which establish strengths and weaknesses, as well as likes and dislikes, may be important. Vocational experts previously routinely testified that "he appeared to be of normal intelligence" or "based on his previous work, he can handle an SVP Category V", etc. Such testimony may lack substance under the new statute.

D. "Capacity for rehabilitation" is a dead subject. A rule of statutory construction (*supra*) mandates that when something is removed from a statute, the legislature had a reason for the removal. Since capacity for rehabilitation previously was in the statute, and is now removed as an element, it has no validity. In my opinion, no longer will vocational experts be permitted to state that the person has the future capability of being...(fill in any unrealistic goal which produces comparable wage).

E. Under the new statute, there may be a return to actual job placement services by vocational experts. This is a two-edged sword. In the past, when respondents suspected a claimant was not making a good faith effort, they would hire a vocational person to do job placement. The attempt was to prove that the claimant was not making a reasonable effort. What if a job placement expert is employed, and there is simply no job **available** for this individual; or only a low paying job?

Should claimants hire job placement experts? Is it cost prohibitive?

F. The Administrative Law Judge is charged with imputing a wage, but there is a presumption that if a claimant is earning wages, that is the appropriate earning level. It would appear that unless a claimant is permanently totally disabled, the Judge will impute 35 hours or so times the minimum wage. In this scenario, as a claimant's attorney, I will urge my clients to accept any part time employment even if it is only a few hours per week. By earning $10 per week, it prevents Administrative Law Judges from imputing a higher wage.